IN THE SUPREME COURT OF THE STATE OF VERMONT
DOCKET NO. 2007-204

In Re: Certificate of Need Application
by the Vermont Department of Health

APPEAL FROM COMMISSIONER'S DESIGNEE,
DEPARTMENT OF BANKING, INSURANCE, SECURITIES AND
HEALTH CARE ADMINISTRATION
Docket No. 06-013-H
Conceptual Certificate of Need Granted April 12, 2007

Brief of Appellee State of Vermont

STATE OF VERMONT

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ISSUES PRESENTED

The Vermont Department of Health applied for a conceptual certificate of need "to create new inpatient [psychiatric] programs . . . and replace the functions currently performed by Vermont State Hospital." PC 2. A conceptual certificate of need does not authorize a new health care project. Rather, it allows the applicant to "undertake the architectural, engineering, and planning activities needed to prepare and file" a final certificate of need application for the project. *Id.*; *see* 18 V.S.A. § 9434(e). The Department of Banking, Insurance, Security, and Health Care Administration (BISHCA), through the Commissioner's designee, granted the conceptual certificate of need with conditions. Appellant Vermont State Employees' Union appeals the decision to this Court. The following issues are presented:

1. Does the Vermont State Employees' Union have standing to appeal the grant of the conceptual certificate of need? Pp. 14-23.
2. Should the decision granting the conceptual certificate of need be affirmed, because it is supported by substantial evidence in the record and is not arbitrary or capricious? Pp. 24-30.

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STATEMENT OF THE CASE

The Vermont State Hospital, a state-run facility that provides inpatient psychiatric care, often on an involuntary basis, should be closed. That was the conclusion of the Vermont State Hospital Futures Plan, a 2005 report commissioned by the Legislature. *See* 2003, No. 122, sec. 141a (Adj. Sess.). The State's Health Resource Allocation Plan, also commissioned by the Legislature, *see* 18 V.S.A. § 9405, adopts the same view.[1] The Department of Health, now the Department of Mental Health,[2] is tasked with the project of deciding how the capacity and functions of the State Hospital should be replaced. As required by state law, before expending significant funds on this project, the Department applied to BISHCA for a conceptual certificate of need "to create new inpatient programs to enhance psychiatric inpatient care and replace the functions currently performed by Vermont State Hospital." PC 2.

The Vermont State Employees' Union ("VSEA") brings this appeal from the decision granting the conceptual certificate of need. VSEA

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[1] The Vermont State Hospital Futures Plan is available at http://healthvermont.gov/mh/pubs/020405VSH_futures.pdf. The Health Resource Allocation Plan is available at http://www.bishca.state.vt.us/HcaDiv/HRAP_Act53/HRAP_final8105.pdf. Both reports are referenced throughout the certificate of need decision in this case. *E.g.,* PC 19-20.

[2] The application was presented by the Department of Health, Division of Mental Health. PC 61. The Division of Mental Health was subsequently reorganized as the Department of Mental Health within the Agency of Human Services. *See* 2007, No. 15 (codified in part at 3 V.S.A. §§ 212(1), 3002(a)(7), 3051, 3089 and 18 V.S.A. §§ 7201 et seq.). This brief makes distinctions between the two where appropriate, but generally refers to the applicant as the "Department."

participated in the administrative proceeding in its capacity as the union representing the employees of the State Hospital. On appeal, VSEA contends generally that the decision granting the conceptual certificate of need was arbitrary and capricious, and vague and internally inconsistent. The State argues first, that VSEA has no standing to bring this appeal, and second, that BISHCA's decision granting the conceptual certificate of need is supported by substantial evidence and should be affirmed.

I. Regulatory Framework: the Conceptual Certificate of Need

The State's certificate of need laws require that "all new health care projects" be subject to review prior to development. 18 V.S.A. § 9431. Through the review process, the Commissioner of BISHCA confirms that the proposed project is consistent with the state's health care policy goals. *Id.*; *see also id.* § 9433 (commissioner's authority); § 9437 (criteria). The Commissioner may approve or reject an application for a new health care project, or may approve the project subject to conditions that further the purposes of the certificate of need statutes. *Id.* § 9440(d)(5).

In 2003, the Legislature amended the certificate of need statutes to require applicants for certain proposed projects to obtain a conceptual development phase certificate of need. 2003, No. 53, sec. 10, *codified at* 18 V.S.A. § 9434(e). The conceptual certificate of need applies to new health care projects estimated to cost more than $20,000,000. 18 V.S.A. § 9434(e). For these projects, the certificate of need requirement is now a two-phase process.

This case involves Phase I only. In Phase I, the applicant seeks a "conceptual development phase" certificate of need. *See id.* If granted, the conceptual certificate of need allows the applicant to expend funds on the planning process. It "permits the applicant to make expenditures for architectural services, engineering design services, and any other planning services needed in connection with the project." *Id.* A conceptual certificate of need does not permit the applicant to "offer[] or further develop[]" the proposed health care project, *id.*; the approval is limited to the planning process.

In Phase II, the applicant seeks approval for its new health care project through a "final" certificate of need. *Id.* As noted in the decision on appeal here, a "Phase II Certificate of Need . . . would be required before project implementation could begin." PC 2.

Both Phase I and Phase II are governed by the same general requirements. *See* 18 V.S.A. § 9434(e). The applications for both the conceptual certificate of need and the final certificate of need must address the certificate of need criteria, which are found at 18 V.S.A. § 9437. The criteria include, among other things, cost, need, and the public good. *Id.* One of the criteria mandates the application be consistent with the Health Resource Allocation Plan, *id.* § 9437(1), which in turn imposes a number of requirements for different types of projects. *See* Dep't of Banking, Ins., Securities & Health Care Admin., Conceptual Certificate of Need Guidance,

at 1-2.[3] As relevant here, the Health Resource Allocation Plan addresses mental health care and issues specific to the replacement of the Vermont State Hospital. *See* PC 19-20; Health Resource Allocation Plan, at 46.

II. Administrative Proceedings for a Certificate of Need

The administrative proceedings are the same for both phases of the certificate of need process. The procedures are set forth in detail in 18 V.S.A. § 9440 and described briefly here. The applicant first files a letter of intent, the Commissioner makes a decision on jurisdiction, and if jurisdiction is found, an application must be filed. 18 V.S.A. § 9440(c)(2), (3). The Commissioner must either deem the application complete or request additional information. *Id.* § 9440(c)(4). Once the application is deemed complete, the formal review process begins.

The Legislature has provided a way for interested parties other than the applicant to participate in the certificate of need proceeding. *Id.* § 9440(c)(6). The Commissioner may grant "interested party" status to "persons or organizations representing the interests of persons who demonstrate that they will be substantially and directly affected by the new health care project under review." *Id.* § 9440(c)(6). The Commissioner may also admit as amicus curiae "[p]ersons able to render material assistance . . . by providing nonduplicative evidence relevant to the determination." *Id.*

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[3] The Conceptual Certificate of Need Guidance is available at http://www.bishca.state.vt.us/HcaDiv/CON_/CON_Main_Index.htm.

When a certificate of need application is complete, the Public Oversight Commission reviews the application and holds a public hearing. *Id.* § 9440(d). The Public Oversight Commission is a citizen advisory panel appointed by the Governor that reviews certificate of need applications and makes recommendations to the Commissioner of BISHCA. *Id.* § 9407. After conducting its review, the Public Oversight Commission makes "written findings" and provides a "recommendation to the Commissioner in favor of or against" the application. *Id.* § 9440(d)(3). The statute does not give the Public Oversight Commission authority to impose conditions on a certificate of need; that authority is granted to the Commissioner. *Compare id.* § 9440(d)(3) (public oversight commission shall make recommendation "in favor of or against" application) *with id.* § 9440(d)(5) (Commissioner's approval may be "subject to such conditions as the commissioner may impose in furtherance of the purposes of this subchapter").

The Commissioner completes review of the application and issues a final decision within 120 days of the date the application was ruled complete, or 150 days if extended. *Id.* § 9440(d)(4).

Finally, the Commissioner shall serve parties with notice of a proposed final decision and provide an additional hearing in three circumstances: the denial of an application in whole or in part, the grant of a contested application, or issuance of a decision "contrary to the recommendation of the public oversight commission." *Id.* § 9440(d)(6). In the latter circumstance, the

proposed decision must also demonstrate that the commissioner "considered all the findings and conclusions of the public oversight commission" and explain "why his or her proposed decision is contrary to the recommendation of the public oversight commission and necessary to further the policies and purposes of" the statutes. *Id.* § 9440(d)(6)(B).

An appeal from the final decision may be taken by "[a]ny applicant, competing applicant, or interested party aggrieved by a final decision." *Id.* § 9440(f).

III. Proceedings Below

The administrative proceeding began with the letter of intent filed by the Department of Health. *See* PC 9. BISHCA responded with a jurisdictional determination that set forth the relevant criteria for the Department's application. PC 10. BISHCA concluded that some certificate of need criteria would be more appropriately considered during Phase II. *Id.* As pertinent here, BISHCA determined that only preliminary information about funding, costs, staffing, and utilization was relevant during conceptual certificate of need review. *Id.* The question of cost, however, would be significant during Phase II review. *Id.*

The Commissioner of BISHCA granted "interested party" status to several individuals, municipalities, advocacy groups, professional organizations, and others, including VSEA. PC 9.

VSEA sought interested party status as "the exclusive labor representative of Vermont State Hospital employees." PC 46. It asserted that it would be "directly and substantially affected by [the] proposal to replace" the State Hospital because it represents the "classified employees whose state jobs, tenure and benefits will likely be eliminated by this project." *Id.* VSEA's letter seeking party status notes the experience and expertise of the current employees of the State Hospital and contends that the State "has refused to commit to utilizing any current, classified VSH staff at any new inpatient facility." *Id.* VSEA would be "directly impacted, as a certified bargaining agent . . . by the loss of members from the Vermont State Hospital." *Id.* In granting "interested party" status, the Commissioner stated that VSEA was "uniquely well suited to represent the concerns of employees" which include "tenure, benefits, and quality of care." PC 48.[4]

The Department's application defined the goals of the planning process as the following: "to create new inpatient programs to enhance psychiatric inpatient care and replace the functions currently performed by Vermont State Hospital. In addition, this project will create new community mental health service capacities to reduce Vermont's reliance on involuntary inpatient psychiatric care." PC 69. The application identified "preferred options for further study," which, in brief, involved some version of an

[4] The Commissioner's letter also states that VSEA would be able to "render material assistance to the Commissioner by providing nonduplicative evidence relevant to the determination." PC 48. This, however, is the statutory standard for an amicus curiae, not an interested party. *See* 18 V.S.A. § 9440(c)(6).

inpatient facility with 40 new beds at Fletcher Allen Health Care combined with six new inpatient beds at Rutland Regional Medical Center and four new beds at the Brattleboro Retreat. PC 70. Through the application, the Department sought permission to "carry out feasibility analyses" and "develop detailed plans for the most feasible models." PC 69.

The application also notes that although the preferred options are the "result of multi-stakeholder study and input," they are "not conclusive." PC 149. The Department indicated that it remains "open to alternatives" and "[o]ther options will be considered should they arise in the course of planning." *Id.* The central purpose of the application was to "request permission to incur planning expenditures to analyze and compare the feasibility of the various options for this project that are under consideration." *Id.* (This is a markedly abbreviated description of the application, which runs 81 pages without tables or appendices. *See* PC 61-150.)

BISHCA deemed the Department's application complete on November 13, 2006. The Public Oversight Commission held a public hearing on December 13, 2006. PC 13.

The Public Oversight Commission voted to recommend approval of the conceptual certificate of need and supported its vote with 13 "findings and observations" and 9 "recommendations." These are reprinted in the Commissioner's final decision. PC 13-16. The observations range from

suggested sources of further information, to questions about the feasibility of constructing an inpatient unit connected to Fletcher Allen Health Care, to comments about the likelihood of the State's "commitment to financial support." PC 13-15. As related to VSEA, the Public Oversight Commission observed that VSEA "makes a credible argument that the current personnel at the Waterbury facility have the specialized training and experience to provide good quality care. It is unclear how such a skilled human resource would be successfully transitioned to an inpatient facility in another location." PC 14. The Public Oversight Commission's recommendations were primarily suggestions for the planning process and final certificate of need application. Again, as pertinent to VSEA, the Public Oversight Commission recommended the certificate of need give "due consideration of retention of the current VSH workforce to address issues of continuance of care and quality of care." PC 16.

During the course of these proceedings, former BISHCA Commissioner John Crowley retired and was replaced by Commissioner Paulette Thabault. Commissioner Thabault, because of a conflict of interest, designated BISHCA's general counsel Herbert W. Olson to act as the final decisionmaker. *See* PC 45 (docket entry 126). Although technically identified as the "Commissioner's designee," PC 16, Mr. Olson exercised the authority of the Commissioner in this matter and this brief accordingly refers to him as the Commissioner.

The Commissioner issued a notice of proposed decision and allowed the parties to comment in writing and at a hearing. PC 16. He subsequently issued a final decision granting the conceptual certificate of need with conditions. PC 2-8 (certificate of need); PC 9-35 (statement of decision).

IV. Decision Granting the Conceptual Certificate of Need

The decision granting the conceptual certificate of need permits the Department to "undertake the architectural, engineering and planning activities needed to prepare and file a Phase II Certificate of Need application." PC 2. Those planning activities "shall include" 32 discrete items identified in the decision. PC 2-5. These items include feasibility studies for the preferred options described above, as well as an obligation to explore "other options." PC 3, 4. The certificate of need is subject to 19 "requirements" (conditions). One condition states that the "planning activities . . . shall explore and consider those alternative solutions for an inpatient psychiatric facility which provide a satisfactory and appropriate balance of the priorities of the Health Resource Allocation Plan and achieve the least expensive capital and operating cost." PC 7. Alternative solutions to be considered "shall include, if necessary to meet the Applicant's burden of proof, consideration of a replacement facility that is owned and/or operated by the State of Vermont." PC 7.

The certificate of need allows the Department to spend up to $4,355,000 on the planning process. PC 2.

The Statement of Decision, as called for by the certificate of need statute, engages in a detailed analysis of the pertinent certificate of need criteria. PC 19-26. Among other things, the decision acknowledges the consensus that the State Hospital should be closed and its functions, including its inpatient beds, replaced. PC 19-20. Appellant VSEA does not challenge the decision's analysis of the certificate of need criteria, so a detailed discussion of this part of the decision is not necessary here.

Two points about the decision do merit further discussion, in light of the issues raised on appeal. First, the decision addresses the "recommendations" made by the Public Oversight Commission. PC 29. The Commissioner notes his effort to adhere to the "intent" of the Public Oversight Commission's recommendations, but also acknowledges the limits on the Commissioner's authority in the certificate of need proceeding. Some recommended conditions were modified as "necessary or appropriate." *Id.* Second, the Commissioner addressed the concerns raised by VSEA. The decision rejects some conditions sought by VSEA as exceeding the Commissioner's authority. PC 30-31. The decision notes, moreover, that VSEA's characterization of the decision is mistaken, because the decision does not prejudge or favor "any particular . . . solution." PC 31.

VSEA timely appealed.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should not reach the merits of VSEA's appeal because the union lacks standing to seek review of the decision below. The grant of the conceptual certificate of need by BISHCA causes no injury to VSEA. The conceptual certificate of need allows the Department to engage in the planning process for the replacement of the Vermont State Hospital – a replacement that "must be developed as soon as is possible and practicable." PC 27. VSEA has not explained, nor can it, why the Department's efforts to study and plan for a new facility causes the "invasion of a legally protected interest" sufficient to satisfy standing requirements. *See, e.g., Hinesburg Sand & Gravel Co. v. State,* 166 Vt. 337, 341, 693 A.2d 1045, 1048 (1997) (quotation omitted).

Even if VSEA could show "injury in fact," VSEA lacks standing because it is not within the zone of interests of the certificate of need statutes. VSEA seeks to protect its interest as the collective bargaining representative for state employees. The certificate of need statutes are not concerned with the labor relations between the State and its employees. If VSEA has a forum for litigating its interest in protecting classified state jobs, that forum is elsewhere and VSEA's rights are governed by state labor laws and collective bargaining agreements. *See generally* State Employees Labor Relations Act, 3 V.S.A. §§ 901-1007.

Should the Court decide to address VSEA's claims on the merits, the Commissioner's decision should be affirmed. VSEA does not attempt to dispute, and there is no doubt on this record, that the decision to grant the conceptual certificate of need is supported by the evidence. As the Commissioner observed, there is "overwhelming consensus that replacement of the Vermont State Hospital with new inpatient facility services will greatly improve the quality of mental health care for Vermonters." PC 27. VSEA's complaints regarding the conceptual certificate of need fail to recognize the difference between Phase I and Phase II of the certificate of need process. The decision on appeal authorizes a planning process, not a final result. It is not ambiguous but rather acknowledges, as it must, that the outcome of that planning process is not certain. The decision should accordingly be affirmed.

STANDARD OF REVIEW

The Court should adhere to its ordinary standard of review in certificate of need appeals, which "is extraordinarily narrow" and "highly deferential." *In re Professional Nurses Servs.,* 2006 VT 112, ¶ 12, 913 A.2d 381; *see* 8 V.S.A. § 16 (judicial review of Commissioner's orders). The decision granting the certificate of need is "presumed correct, valid and reasonable" absent a "clear and convincing showing to the contrary." *Id.* (quotation omitted). Findings are not reversed unless shown to be clearly erroneous and interpretations of the governing statutes and regulations will be sustained

unless the appellant makes a "compelling indication of error." *Id.* ¶ 13 (quotation omitted).

In *Professional Nurses Service,* the Court acknowledged that the certificate of need proceeding is a "broad information-gathering process" that is "similar in many respects to a quasi-legislative proceeding." *Id.* ¶ 15. The Court accordingly found it appropriate to afford the Commissioner's decision the "widest possible latitude on review." *Id.* That same standard applies here, and, indeed, is perhaps even more appropriate for the Court's review of a Phase I, conceptual development certificate of need. [5]

ARGUMENT

I. VSEA does not have standing to bring this appeal.

Before turning to the merits, the Court must decide whether VSEA has standing to pursue this appeal. It does not. Although the Commissioner granted VSEA interested party status in the certificate of need proceeding,

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[5] A 2003 legislative amendment modified the standard of review in certificate of need appeals only where the "commissioner's decision is contrary to the recommendation of the public oversight commission." 18 V.S.A. § 9440(f). In such cases, the "standard of review on appeal shall require that the commissioner's decision be supported by a preponderance of the evidence in the record." *Id.* Here, although the Commissioner imposed conditions slightly different from those suggested by the Public Oversight Commission, his decision was not "contrary" to the Public Oversight Commission's recommendation. The Public Oversight Commission recommended granting the certificate of need and he did so. The standard of review in § 9440(f) therefore does not apply in this case; nor does VSEA argue it should. *See* VSEA's Br. 9-10; *see also* infra at 29 n. 9.

VSEA has not, and cannot, satisfy either the constitutional or prudential requirements for standing to pursue this appeal. The appeal should be dismissed for lack of standing, for the following reasons: (1) VSEA must have standing to appeal this administrative action; (2) VSEA cannot satisfy the core constitutional requirements for standing; and (3) VSEA's interest in protecting the jobs of state employees is not within the "zone of interests" of the certificate of need program.

A. Principles of standing apply in appeals from administrative actions.

VSEA does not have standing to bring this appeal in the Supreme Court merely because it was granted "interested party" status in the administrative proceeding below. By statute, only an interested party who is "aggrieved" by the decision may bring an appeal. 18 V.S.A. § 9440(f). This Court has interpreted language of this kind to incorporate general principles of standing doctrine. *See, e.g., In re Corcoran,* 2005 VT 52, ¶ 3, 178 Vt. 579, 878 A.2d 1069 ("In applying other statutes that extend private remedies or appeal rights to 'aggrieved' parties, we have applied general standing doctrine, which requires that plaintiff suffer an injury in fact." (quotation omitted)); *Blum v. Friedman,* 172 Vt. 622, 624, 782 A.2d 1204, 1207 (2001) (same). To qualify as an aggrieved party with standing to appeal, VSEA must establish an "injury in fact," meaning, an "invasion of a legally protected interest." *Corcoran,* 2005 VT 52, ¶ 3 (quotation omitted); *Hinesburg,* 166 Vt. at 341, 693 A.2d at 1048.

This Court's precedents are in accord with federal law. The U.S. Supreme Court, in *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972), held that a party challenging agency action under the federal Administrative Procedure Act must meet the "injury in fact" test. Following *Sierra Club,* the Court of Appeals for the District of Columbia Circuit, which hears appeals from federal agencies, has repeatedly outlined standing requirements for administrative appeals. In a 1983 ruling, that court deemed it "essential" for a party challenging agency action to show "[i]njury in fact, caused by the substance of an agency's action or inaction." *Capital Legal Foundation v. Commodity Credit Corp.,* 711 F.2d 253, 258 (D.C. Cir. 1983). A "sincere, vigorous interest in the action challenged" is insufficient, if that interest is "uncoupled from any injury in fact, or tied only to an undifferentiated injury common to all members of the public." *Id.* A litigant's injury "need not be large, but it must exist and be distinct." *Id.* (citation omitted). A litigant must also satisfy the "zone of interests" test, showing that its "interest in the agency action appears to fall within the ambit of the constitutional clause, statute, or regulation allegedly violated." *Id.* at 258-59.

Recent rulings from the same court confirm that parties seeking review of administrative action must have standing, and bear the burden of demonstrating their standing to the court of appeals. *See, e.g., Sierra Club v. EPA,* 292 F.3d 895, 900-01 (D.C. Cir. 2002) (litigant whose standing is "not self-evident should establish its standing . . . at the first appropriate point in

the review proceeding"); *Int'l Brotherhood of Teamsters v. Transp. Security Admin.,* 429 F.3d 1130, 1134-35 (D.C. Cir. 2005) (dismissing union's petition for review of agency guidance, where union failed to establish Article III standing in its brief). The Court of Appeals has also promulgated a rule for administrative appeals that requires an appellant to "set forth the basis for the claim of standing" in the party's opening brief. U.S. Court of Appeals for the District of Columbia Circuit, Circuit Rule 28(a)(7).

VSEA mistakenly contends that its designation as an "interested party" suffices to meet any standing requirements. VSEA Br. 2. The statute provides that interested party status "shall be granted to persons or organizations representing the interests of persons who demonstrate that they will be substantially and directly affected by the new health care project under review." 18 V.S.A. § 9440(c)(6). This standard does not equate with judicial standing requirements. Nor could it; the "interested party" determination is made at the outset of the proceeding, while a party seeking to appeal must demonstrate that it is "aggrieved" by the final agency action.

Moreover, the record shows that the Commissioner did not apply judicial concepts of standing in granting interested party status to VSEA. *See* PC 48-49 (letter granting interested party status). The Commissioner's letter to VSEA acknowledges that VSEA is "uniquely well suited to represent the concerns of employees of Vermont State Hospital," including "tenure, benefits, and quality of care." PC 48. The Commissioner did not, however,

evaluate whether VSEA could demonstrate "injury in fact" or any other aspect of judicial standing – nor did he have any obligation to do so, in the context of the administrative certificate of need proceeding. Given the "broad information-gathering process" of that proceeding, *Professional Nurses Serv.,* 2006 VT 112, ¶ 15, the Commissioner reasonably sought input from a wide range of persons and organizations. Now that VSEA seeks judicial resolution, however, the burden rests on VSEA to show its standing. *See, e.g., Brod v. Agency of Natural Res.,* 2007 VT 87, ¶ 9. It cannot do so.

B. VSEA cannot satisfy the core constitutional requirements for standing.

This Court has adopted the federal three-part standing test. *Parker v. Town of Milton,* 169 Vt. 74, 77-78, 726 A.2d 477, 480 (1998). To establish the jurisdictional prerequisite of an actual controversy, VSEA must satisfy this test by showing, "at a minimum, (1) injury in fact, (2) causation, and (3) redressability." *Id.* As rephrased in *Parker,* VSEA "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct, which is likely to be redressed by the requested relief." *Id.* at 78, 726 A.2d at 480. VSEA fails both the first and third prongs of test; it can demonstrate neither injury in fact nor redressability.

1. VSEA cannot show injury in fact.

VSEA cannot demonstrate injury in fact – that is, a distinct, personal injury – caused by BISHCA's decision to grant a conceptual certificate of need to the Department of Health. An "injury in fact" is defined as the "invasion of

a legally protected interest." *Hinesburg,* 166 Vt. at 341, 693 A.2d at 1048 (quotation omitted). In *Brod v. Agency of Natural Resources,* the Court observed that a party "often has a greater burden in showing injury in fact" where a party challenges government action and the "alleged injury is not a direct result of that government action." 2007 VT 87, ¶ 10. While *Brod* addressed standing in the context of a declaratory judgment action, the same reasoning applies here. VSEA is not regulated by the certificate of need statutes and is not the subject of the certificate of need proceeding or decision. VSEA's true interest is not in the regulatory process itself but in the Department's actions in closing the State Hospital and replacing its functions. *See, e.g.,* PC 46. VSEA thus bears the "greater burden" identified in *Brod,* of showing that the Department's "response to regulation will 'produce causation and permit redressability of injury.'" 2007 VT 87, ¶ 10 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992)).

That showing cannot be made here. As both the statute and the decision demonstrate, the conceptual certificate of need permits the Department to expend funds on the planning process for the replacement of the Vermont State Hospital. It does not authorize the Department to develop, construct, or open a health care facility. The Department must obtain a certificate of need before beginning construction on a new facility. The conceptual certificate of need does not authorize any change in the present operation of the State Hospital.

VSEA has not shown how it is injured, in a concrete and personal way, by a decision allowing the Department to expend funds on the planning process. An objection to the planning process itself or to the spending of state money is nothing more than a generalized grievance. *See, e.g., Hinesburg,* 166 Vt. at 341, 693 A.2d at 1045 (noting "rule against adjudication of generalized grievances"). It is not an injury distinct to VSEA, the union representing state employees.

Two possible allegations of injury may be gleaned from the arguments in VSEA's brief, but neither is sufficient to make out an injury in fact. First, VSEA may contend it is injured because the conceptual certificate of need makes it more likely the State Hospital will be replaced in part by a new facility connected to Fletcher Allen, and that facility may not employ classified state employees. A claim of injury along these lines is speculative and inconsistent with the certificate of need statutes and decision. The decision does not endorse any particular option for replacing the State Hospital. PC 31, 34. It acknowledges the Department's "preferred option" but requires the Department to evaluate other possibilities. *Id.* Moreover, to obtain a final certificate of need for any version of the project, the Department must still satisfy the certificate of need criteria. For VSEA to be "injured" by a loss of state jobs – an injury the State does not concede is cognizable here, *see infra* 22-23 – the Department must (1) decide, after the planning process, to proceed with the Fletcher Allen Health Care option; (2)

obtain a Phase II certificate of need for that facility; and (3) decide that the new facility will not be staffed by state employees. That chain of events is too speculative and uncertain to confer standing on VSEA to challenge the conceptual certificate of need.

Second, VSEA complains that the conceptual certificate of need decision is vague and therefore undermines its ability to participate in the next proceeding, when the Department seeks a final certificate of need. But VSEA has not shown any distinct and personal injury caused by the terms of the decision. When the Department seeks a final certificate of need, the Department must satisfy the certificate of need criteria at that time. VSEA appears to view the conceptual certificate of need as a blueprint for the Department to obtain a final certificate of need. That is not how the statute works. The conceptual certificate of need authorizes the Department to spend money on the *planning* process, with the conditions specified in the decision. It does not guarantee the Department will obtain a certificate of need for a particular project if certain steps are followed.

2. VSEA cannot satisfy the redressability requirement.

Even if VSEA demonstrated some cognizable injury, which it has not, the relief it seeks – reversal of the decision below – would not redress that injury. The Commissioner properly declined to require the Department, as a condition of the certificate of need, to adopt a plan designed to retain the current employees of the State Hospital. PC 30-31; *see infra* 22-23 (explaining

scope of certificate of need proceeding). VSEA cannot obtain guarantees about the tenure of state employees through the certificate of need process. Thus, even if VSEA contends that BISHCA's ruling makes the loss of classified positions more likely – a point the State does not concede – a claimed injury of this kind is not redressable.

C. VSEA does not fall within the zone of interests of the certificate of need statutes.

VSEA also lacks standing because its alleged injury does not fall within the "zone of interests" of the certificate of need statutes. *See Hinesburg,* 166 Vt. at 341, 693 A.2d at 1048 (adopting zone of interests requirement). VSEA appeared below and appears here in its capacity as the union representing the current classified employees of the Vermont State Hospital. In seeking interested party status below, VSEA asserted the "direct impact[]" on the union as a "certified bargaining agent." PC 46. VSEA described its concern that the State has not committed to using classified employees at a new facility and is "seeking to outsource its direct care . . . to private hospitals." *Id.*

According to the Legislature, the certificate of need requirement "avoids unnecessary duplication and contains or reduces increases in the cost of delivering services, while at the same time maintaining and improving the quality of and access to health care services, and promoting rational allocation of health care resources in the state." 18 V.S.A. § 9431. It calls for review of the "need, cost, type, level, quality, and feasibility" of any new

health care project. *Id.* Nothing in this statement of policy nor in the statutory criteria, 18 V.S.A. § 9437, suggests that the certificate of need review extends to VSEA's interest in its labor relations with the State of Vermont. The Commissioner implicitly recognized as much, because he declined to adopt a condition aimed at requiring the Department to undertake "a transition plan designed to retain current employees." PC 30. As he concluded, "requiring such a plan as a condition of the Conceptual Certificate of Need is beyond the lawful scope of the Commissioner's authority." PC 31.

The certificate of need statutes have nothing to say about the relationship between the State as employer and VSEA as the bargaining agent for state employees. The Legislature regulates this relationship by statute, *see* State Employees Labor Relations Act, 3 V.S.A. §§ 901-1007, and VSEA may pursue its interests through collective bargaining and through the grievance process where appropriate. *Cf. Grievance of VSEA,* 164 Vt. 214, 666 A.2d 1182 (1995) (upholding Labor Relations Board's dismissal of grievance regarding privatization of a food service program); 3 V.S.A. § 343 (requiring notice to collective bargaining agent of intent to enter privatization contract). It may not do so through this appeal.[6]

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[6] The Secretary of the Agency of Human Services commissioned an Employees Work Group Report, as part of the Futures project, to provide input on options relating to staff in the transition to new inpatient care services for mental health patients. The Work Group included representatives of VSEA and current employees at the State Hospital. The report is available at

II. The decision granting the conceptual certificate of need is supported by the evidence and VSEA identifies no persuasive basis for reversal.

The Department's application for a conceptual certificate of need is marked by its exceptional detail and thoughtful approach to planning for the future treatment of Vermonters with serious mental illness. *See* PC 61-150. The application reflects the attention focused on this issue by the Legislative and Executive Branches, and integrates input from health care providers, regulators, advocates, and consumers. The Legislature commissioned the first Futures report in 2004. The conclusions of that report, and subsequent recommendations of the Futures Advisory Committee (later replaced by the Advisory Council for Mental Health Services Transformation), form the core of the Department's application. The work of the Committee, together with the Legislature and the Agency of Human Services, reflects, as the application states, "a strategic planning process for the future of Vermont's public mental health system." PC 70.[7]

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http://healthvermont.gov/mh/futures/documents/090706vshemployeeworkgroupreport.pdf

[7] The Legislature has played an active role in overseeing the Futures project. The Legislature has called for the replacement of the State Hospital, endorsed the principles of the Futures Report, and funded the planning process. *See* 2005, No. 72, sec. 113e (a)(1) (adopting principles of report; calling for replacement of state hospital); 2006, No. 147, sec. 4(a) (appropriating $1,000,000 for "continued planning, design, and permitting associated with the creation of a new inpatient facility to replace the current Vermont state hospital"); 2007, No. 9 (appropriating funds for Legislature to hire consultant to study the planning process and make recommendations); 2007, No. 65, secs. 124a-124e (among other things, creating the Advisory Council for Mental Health Services Transformation, and renewing appropriation for planning process authorized by conceptual certificate of need).

Against this background, the Commissioner had no trouble finding that the Department's application satisfied the pertinent certificate of need criteria. As to the need, there is "no doubt" that the State must replace the State Hospital, and must do so "as soon as is possible and practicable." PC 27. The proposal will improve the quality of health care and serve the public good. *Id.* As the Commissioner observed, the Department's application was supported by "an overwhelming consensus that replacement of the Vermont State Hospital with new inpatient facility services will greatly improve the quality of mental health care." *Id.*

VSEA does not argue with these conclusions but raises four criticisms of the form of the decision. None has merit.

First, VSEA contends the decision is ambiguous because it calls for the Department to evaluate alternative options (other than the preferred option) but does not authorize the Department to spend money to do so. VSEA's Br. 10-12. That is not so. The Phase I certificate of need permits the Department to "undertake . . . architectural, engineering and planning activities" and lists 32 tasks included in those activities. PC 2-3. "Explore other options" is one task on the list. PC 3. Moreover, one of the conditions attached to the certificate of need similarly requires consideration of "alternative solutions." PC 7. The Phase I certificate of need thus permits the Department to expend funds to evaluate alternatives. VSEA contends otherwise because one task on the list refers to "expenditures" and the other 31 items do not. That is, in

VSEA's view, the majority of the provisions of the certificate of need are meaningless, because the decision only allows the Department to spend money on one of the 32 tasks included in the project description. That interpretation is not plausible. The conceptual certificate of need allows the Department to expend funds on all the tasks included within the project description. *See* PC 2-3.

Second, VSEA appears to suggest that the certificate of need is flawed because it allows the Department to plan for the preferred option – placing most of the new inpatient beds at Fletcher Allen – without addressing perceived problems with that proposal. VSEA's Br. 12-14. Here, VSEA fails to recognize the limits of the *conceptual* certificate of need process. The conceptual certificate of need does not authorize the Department to construct a new inpatient facility in collaboration with Fletcher Allen Health Care. Rather, it allows the Department to engage in the planning process. The concerns raised by VSEA in its brief – that a facility at Fletcher Allen would cost too much, for example[8] – may be raised in Phase II of the certificate of need process. As BISHCA correctly observed, only "preliminary information about funding, costs, staffing and utilization are relevant during the

[8] Contrary to VSEA's assertion, the certificate of need statute does not require that "the least costly alternative is chosen." VSEA Br. 8. In applying the cost criterion, the Commissioner must find the "cost of the project is reasonable." 18 V.S.A. § 9437(2). One factor in this analysis is that "less expensive alternatives" either "do not exist," or "would be unsatisfactory," or "are not feasible or appropriate." *Id.* Thus, a proposed project may be approved even if less expensive alternatives are identified, if those alternatives are not satisfactory or appropriate.

Conceptual Certificate of Need review." PC 10. The decision on the conceptual certificate of need could not reasonably address these issues in detail, because the Department did not yet have the necessary information. The conceptual certificate of need allows the Department to gather that information through the planning process.

Third, VSEA wrongly claims that the decision is ambiguous as to whether the Commissioner adopted the "recommendations" of the Public Oversight Commission. VSEA's Br. 14. There is no ambiguity. The Commissioner adopted the findings of the Public Oversight Commission but did not adopt its recommended conditions. The decision is clear on this point. It states that the Commissioner "fully considered" the recommendations and "endeavored to tailor the conditions set forth in Para. I. . . to the intent . . . of the recommendations." PC 29. In doing so, however, the Commissioner recognized the "boundaries of the Commissioner's authority and the appropriate exercise of the Commissioner's discretion." *Id.* Accordingly, he imposed conditions on the certificate of need that changed the language suggested by the Public Oversight Commission where "necessary or appropriate." *Id.* This explanation does not leave the parties guessing. The conditions placed on the certificate of need are the 19 conditions listed in Paragraph I of the decision. *See* PC 32-35 ("the following conditions and requirements must be attached to the Conceptual Certificate of Need").

Moreover, the Commissioner unambiguously rejected VSEA's request for a condition ensuring the retention of current employees of the State Hospital. *See* PC 30; PC App. 334; VSEA Br. 14. He concluded that the proposed condition exceeded his authority. PC 30-31. VSEA contends the Commissioner's rejection of the proposed condition is inconsistent with his finding regarding the skills and experience of the current employees of the State Hospital. *See* PC 14 (finding 11); PC 26 (adopting findings); PC 30-31 (discussing issue). There is no inconsistency, however. The evidence supported the finding. But the law does not permit the Commissioner to condition the certificate of need to require the State to retain the current employees of the State Hospital.

Last, VSEA argues that the Commissioner, in issuing the Notice of Proposed Decision, failed to provide an adequate explanation of how the decision was contrary to the recommendation of the Public Oversight Commission. *See* VSEA Br. 15-17. Not only is VSEA mistaken to characterize the decision as "contrary" to the recommendation of the Public Oversight Commission, this argument was not raised by VSEA below. *See* PC App. 334-35 (VSEA's comments on proposed decision); PC App. 195-202 (VSEA's comments at hearing on proposed decision). Because the claim was not raised below, the Commissioner had no opportunity to address it. Any claim of error is therefore waived. *See, e.g., Northern Sec. Ins. Co. v. Perron,* 172 Vt. 204, 226, 777 A.2d 151, 167 (2001) (issues not raised below are waived on appeal).

In any event, the Commissioner did not err. By statute, if the Commissioner proposes to issue a decision "contrary to the recommendation of the public oversight commission," the proposed decision shall "explain[] why his or her proposed decision is contrary to the recommendation of the public oversight commission and necessary to further the policies and purposes of this subdivision." 18 V.S.A. § 9440(d)(6)(B)(i). Assuming without conceding that this requirement applied here,[9] the Commissioner satisfied it. The proposed decision notes that the Commissioner did not accept the language of some of the conditions recommended by the Public Oversight Commission. It explains his reason: to limit the conditions to the "boundaries of the Commissioner's authority and the appropriate exercise of the Commissioner's discretion." PC 330. The proposed decision also explained at some length both the legal constraints on the Commissioner and the need for deference to "legitimate functions of other branches of government," including, for example, the Legislature's role in "appropriating funds . . . and overseeing the . . . Department." PC 329. The proposed decision then listed 18

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[9] The Commissioner invoked this requirement and held a hearing on the proposed decision because the conditions in the proposed decision "could have been considered . . . contrary at least in some respects" to those of the Public Oversight Commission. PC App. 188. Under the circumstances, the prudent approach was to provide notice and hold the hearing as called for under the statute. *See* 18 V.S.A. § 9440(d)(6)(B)(i), (ii). Viewed as a whole, however, the decision of the Commissioner is not "contrary to" the recommendation of the Public Oversight Commission. "Contrary" means "incompatible" or "opposite." *See, e.g.,* Merriam-Webster Online Dictionary, at http://www.m-w.com/dictionary/contrary. Here, while the Commissioner made more detailed findings and imposed somewhat different conditions, his decision is substantially the same as the recommendation reached by the Public Oversight Commission.

proposed conditions for the certificate of need. PC 330-32. Nothing more was required to give the parties notice and comply with the statute.

CONCLUSION

The decision granting the Phase I conceptual certificate of need should be affirmed.

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